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BALA SUBRAMANIAM SENGODAN v. AHAMED SIDIQUE ABDUL LATIFF & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
IDRUS HARUN JCA
B VERNON ONG LAM KIAT JCA
[CIVIL APPEALS NO: W-02-1496-09-2014 & W-02(IM)-1497-09-2014]
5 MARCH 2015

C ***CIVIL PROCEDURE:*** *Time – Extension of time – Appeal – Action for recovery for sum held by solicitor as stakeholder – Solicitor struck off Roll of Advocates and Solicitors – Disciplinary Board ordered for money to be refunded – Notice of appeal against order of Disciplinary Board made two years and three months from date of order – Whether solicitor had good prospects of being successful – Whether there was procedural default – Whether warranted court's discretion to extend time – Legal*
D *Profession Act 1976, s. 103(E) – Whether complied*

LEGAL PROFESSION: *Professional discipline – Failure to return sum held as stakeholder – Solicitor struck off Roll of Advocates and Solicitors –Appeal against decision of Disciplinary Board – Whether solicitor had good prospects of being successful – Whether solicitor afforded opportunity to be heard – Whether solicitor*
E *complied with s. 103(E), Legal Profession Act 1976*

The respondent had forwarded RM250,000 ('the said sum') to the appellant, an advocate and solicitor, to be held as stakeholder, in the appellant's client's account for a matter of stay of execution application. However, the application was dismissed and the respondent requested for the return of the
F said sum. Since the appellant failed to release the said sum despite repeated demands by the respondent, the latter lodged a complaint to the Disciplinary Board ('DB'). Due to non-participation of the appellant in the hearing held by the Disciplinary Committee ('DC'), the DB ordered the appellant to refund the said sum to the respondent within three months from the date of
G the order. The appellant was further struck off the Roll of Advocates and Solicitors of the High Court of Malaya. Due to the appellant's failure/refusal to return the money, the respondent commenced an action against the appellant at the Sessions Court for the recovery of the said sum. The respondent filed for summary judgment which was granted by the Sessions
H Court. Hence, the present appeals. The appellant appealed (i) against the decision of the High Court in which the appellant's appeal against the order of the DB was struck out; and (ii) against the High Court order in which the appellant's notice of motion seeking, *inter alia*, an extension of time to file his appeal against the DB order which was dismissed. In support of his
I appeal, the appellant submitted that he had good prospects of success and should not be denied or deprived of his opportunity to have his appeal be determined on its merits because of procedural default.

Held (dismissing appeals)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) The appellant was given ample opportunity to be present at the hearing and had the benefit of cross-examining the respondent and his witnesses but he refused to do so. A reading of the DC's report revealed that the DC had considered and evaluated all the relevant evidence adduced during the hearing. The factual findings and legal conclusions of the DC were amply supported by the credible evidence. The appellant had not been able to point to any error of principle nor to any matter which the DC wrongly took into account or wrongly failed to take into account. (paras 44 & 47)

(2) The appellant only filed an appeal against the order of the DB two years and three months from the date he received the said order. Therefore, the appellant had clearly failed to comply with the timelines for the appeal as provided under s. 103(E) of the Legal Profession Act 1976. Furthermore, the appellant failed to furnish any relevant evidence to explain the delay in filing a notice of appeal within the time limit. There was no material on which the court could exercise its discretion to extend the time for the appellant to file a notice of appeal. The appellant had failed to demonstrate that he ought to be granted an extension of time to file a notice of appeal. (paras 29, 33 & 37)

Bahasa Malaysia *Translation Of Headnotes*

Responden telah membayar RM250,000 ('jumlah tersebut') kepada perayu, seorang peguambela dan peguamcara, untuk dipegang sebagai pemegang amanah, ke dalam akaun anak guam perayu bagi hal perkara permohonan penggantungan pelaksanaan. Walau bagaimanapun, permohonan tersebut ditolak dan responden memohon pemulangan jumlah tersebut. Oleh kerana perayu gagal menyerahkan jumlah tersebut walaupun tuntutan telah berulang kali dibuat oleh responden, responden membuat aduan kepada Lembaga Disiplin ('DB'). Akibat tiada penyertaan oleh perayu dalam perbicaraan yang dijalankan oleh Jawatankuasa Disiplin ('DC'), DB mengarahkan perayu memulangkan semula jumlah tersebut kepada responden dalam tiga bulan daripada tarikh perintah tersebut. Perayu seterusnya dipotong daripada daftar Peguambela dan Peguamcara Mahkamah Tinggi Malaya. Akibat kegagalan/keengganan perayu untuk memulangkan semula wang tersebut, responden memulakan satu tindakan terhadap perayu di Mahkamah Sesyen bagi pemulangan jumlah tersebut. Responden memfailkan penghakiman terus yang telah dibenarkan oleh Mahkamah Sesyen. Oleh itu, rayuan-rayuan ini. Perayu merayu (i) terhadap keputusan Mahkamah Tinggi dalam mana rayuan perayu terhadap perintah DB dibatalkan; dan (ii) terhadap perintah Mahkamah Tinggi dalam mana notis usul yang dipohon oleh perayu, antara lain, bagi lanjutan masa untuk memfailkan rayuannya terhadap perintah DB

A yang telah ditolak. Menyokong rayuannya, perayu menghujahkan bahawa dia mempunyai prospek yang cerah untuk berjaya dan tidak sepatutnya dinafikan atau dihalang untuk mendapat peluang rayuannya diputuskan berdasarkan merit hanya disebabkan kecacatan prosedur.

Diputuskan (menolak rayuan-rayuan)

B **Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:**

(1) Perayu telah diberikan peluang yang mencukupi untuk hadir semasa perbicaraan dan mempunyai manfaat untuk menyoal balas responden dan saksi-saksinya tetapi dia enggan berbuat demikian. Penelaahan ke
C atas laporan DC mendedahkan bahawa DC telah mempertimbangkan dan menilai kesemua keterangan yang relevan semasa perbicaraan. Dapatan-dapatan fakta dan kesimpulan-kesimpulan perundangan oleh DC disokong kuat oleh keterangan yang boleh dipercayai. Perayu tidak dapat menunjukkan sebarang kekhilafan prinsip atau sebarang hal
D perkara yang salah diambil pertimbangan atau secara khilaf gagal dipertimbangkan.

(2) Perayu memfailkan rayuan terhadap perintah DB hanya dua tahun tiga bulan selepas tarikh dia mendapat perintah tersebut. Oleh itu, perayu
E jelas gagal mematuhi garis-garis masa bagi rayuan seperti yang diperuntukkan di bawah s. 103(E) Akta Profesion Undang-undang 1976. Tambahan lagi, perayu gagal untuk mengemukakan keterangan relevan untuk menjelaskan kelewatan memfailkan notis rayuan dalam tempoh had masa. Tiada material yang boleh disandarkan oleh mahkamah untuk menjalankan kuasa budi bicaranya untuk melanjutkan masa untuk
F perayu memfailkan notis rayuan. Perayu gagal menunjukkan bahawa dia sepatutnya diberikan lanjutan masa untuk memfailkan rayuan.

Case(s) referred to:

Abdul Rahim Ponniah Abdullah v. Kulim Intensive Driving Centre Sdn Bhd [2000] 1 LNS 204 HC ***(refd)***

G *Bar Malaysia v. Mohd Fadli Shuib And Another (Civil Appeal No. K-02-2354-10-2012) CA (Unreported)* ***(refd)***

Bank Utama (Malaysia) Berhad v. Sistem Bis Komputer Sdn Bhd & Ors [1994] 4 CLJ 347 HC ***(refd)***

Bar Malaysia v. Mohd Fadli Shuib And Another [2014] 2 MLJ 373 ***(refd)***

Development & Commercial Bank Bhd v. Tan Ong Hwa & Anor [1992] 2 MLJ 764 ***(refd)***

H *R v. Secretary of State for the Home Department [2014] EWCA Civ 1633* ***(refd)***

Ratnam v. Comaraswamy and other [1964] All ER 935 ***(refd)***

Revici v. Prentice Hall Incorporated and Others [1969] All ER 772 ***(refd)***

Soh Keng Hian v. American International Assurance Co Ltd [1996] 2 CLJ 449 CA ***(refd)***

Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [1998] 4 CLJ 883 CA ***(refd)***

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Legislation referred to:
Legal Profession Act 1976, s. 103E

For the appellant - Mohamed Hanipa Maidin (Aminuddin Zulkipli with him); M/s Amin Amirul & Partners
For the respondent - George Varughese; M/s George Varughese
For the intervener - Tieh Siaw Siong; M/s SS Tieh

[Editor's note: For the High Court judgment, please see Bala Subramaniam Sengodan lwn. Ahmed Sidique Abdul Latiff & Satu Lagi [2014] 1 LNS 1667 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

[1] The following two appeals, namely:

(i) Civil Appeal No. W-02-1496-09/2014 (the first appeal); and

(ii) Civil Appeal No. W-02(IM)-1497-09/2014 (the second appeal).

are fixed to be heard together.

[2] The first appeal is an appeal by the appellant against the High Court order dated 23 July 2014 in which the appellant's appeal against the order of the Advocates and Solicitors' Disciplinary Board dated 9 September 2011 (the DB order) was struck out with costs to the respondent.

[3] The second appeal is the appellant's appeal against the High Court order dated 23 July 2014 in which the appellant's notices of motion dated 31 March 2014 (encl. 22) seeking, *inter alia*, an extension of time to file his appeal against the DB order, was dismissed with costs to the respondent.

[4] In the meantime, however, the appellant had filed separate notices of motion in both appeals (encl. 5a), seeking the following orders:

i. Bahawa Perayu diberi kebenaran untuk meminda Notis Rayuan bertarikh 22.8.2014, Memorandum Rayuan bertarikh 02.10.2014 dan Rekod Rayuan sepertimana menurut Aturan 21 Kaedah-Kaedah Mahkamah Rayuan 1994;

ii. Bahawa kos permohonan ini boleh menjadi kos dalam kausa.

[5] In essence, the notices of motion sought to add Majlis Peguam Malaysia (The Bar Council) as one of the parties to both appeals. The Bar Council was made an intervener at the High Court pursuant to an order dated 9 July 2014 but the Bar Council was not named as one of the parties to both appeals by the appellant.

A **[6]** The respondent and the intervener did not oppose the granting of the orders prayed for in encl. 5a and agreed that the appeals be heard on their merits. Accordingly, the court allowed the notices of motion with no order as to costs.

Factual Antecedents

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[7] A brief advertence to the factual antecedents is necessary to put these appeals in their proper perspective. We would like to mention that the factual antecedents are taken from the appellant's and the intervener's written submissions.

C **[8]** The appellant was formerly an advocate and solicitor and was practising under the name and style of Messrs SBS Maniam & Azizan (the legal firm).

[9] The respondent was formerly a director and shareholder of companies known as Teratak Kristal Sdn Bhd and Cheri Catering Sdn Bhd
D (the companies).

[10] The legal firm was appointed by the respondent as a solicitor of the companies to act in the following matters:

(i) Shah Alam High Court No.: 22-183-2009 (the first matter); and

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(ii) Shah Alam Sessions Court No.: 52-S2-2010 (the second matter).

[11] In or around January 2010, the respondent gave instructions to the appellant to take over conduct of the first matter from the previous solicitors, Messrs A J Ariffin, Yeo & Harpal (AYH). In respect of the first matter, a
F summary judgment had already been entered against Teratak Kristal Sdn Bhd when AYH was still on record.

[12] For the conduct of both matters, the appellant was paid a sum of RM50,000 in respect of his professional fees and disbursements.

[13] The gist of the respondent's complaint to the DB is that on the
G appellant's advice, the respondent had forwarded to the legal firm a sum of RM250,000 *vide* a letter dated 2 February 2010 enclosing a CIMB Banker's Cheque No. 388850 dated 2 February 2010 to be held by the appellant as stakeholder in the appellant client's account for the purpose of stay of execution application for the first matter. However, the stay of execution
H applications in both the High Court and the Court of Appeal were dismissed.

[14] Subsequently, the respondent requested for the sum of RM250,000 to be returned to him. Despite the respondent's repeated demands for the money to be returned, the appellant had failed to release the same.

I **[15]** On 4 August 2010, the respondent lodged a complaint against the appellant with the DB.

[16] *Via* a letter dated 29 September 2010 from the DB to the appellant, the DB sought a written explanation from the appellant. On 14 October 2010, the appellant sent a letter of explanation to the DB.

[17] The appellant was afforded the opportunity to be heard during the hearing held on 14 July 2011 by the disciplinary committee ("DC"). However, the appellant chose not to participate in the hearing.

[18] The DB affirmed the findings of liability and recommendation on punishment by the DC. On 9 September 2012, the DB ordered the appellant to refund the sum of RM250,000 to the complainant/respondent within three months from the date of the order. The DB further ordered that the appellant be struck-off the Roll of Advocates and Solicitors of the High Court of Malaya to take effect within 21 days from the date of the order.

[19] Thereafter, the respondent made a demand for the said RM250,000 *vide* the respondent's solicitors' letter dated 23 November 2011. However, the appellant still failed and/or refused to return the money.

[20] In February 2012, the respondent instituted an action against the appellant *vide* Kuala Lumpur Sessions Court Summons No.: 523863-02/2012 for the return of the sum of RM250,000 as ordered by the DB.

[21] The respondent then filed an application for summary judgment and on 27 July 2012, the Sessions Court granted judgment against the appellant and ordered the appellant to pay the respondent the sum of RM250,000 with 4% interest per annum from 2 February 2010 until full settlement together with costs.

[22] The appellant's application to set aside the said judgment and for the stay of execution in the Kuala Lumpur Sessions Court Summons No.: 52-3863-02/2012 had also been dismissed on 14 March 2014. Therefore, the judgment is a valid and enforceable judgment.

[23] The respondent then commenced bankruptcy proceedings against the appellant *vide* Bankruptcy Petition No.: 29-6925-12/2012 since the appellant refused to comply with the judgment dated 27 July 2012.

[24] Subsequently, the appellant filed two applications in December 2013 to set aside the bankruptcy notice and the creditor's petition and another application to disqualify Messrs George Varughese from representing the respondent. Both the said applications had been dismissed on 22 April 2014.

[25] On 10 July 2014, the court granted adjudication and receiving orders against the appellant and the appellant was declared as a bankrupt.

[26] Subsequently, *vide* the appellant's application to discharge as a bankrupt on 9 September 2014, the court discharged the appellant as a bankrupt since the appellant had paid to the insolvency department the judgment sum claimed by the respondent in creditor's petition amounting of RM281,271.14.

A **The Appeal**

[27] For the sake of avoiding a piecemeal consideration of the matter, we allowed all the parties' counsel to proceed and present their arguments on both appeals. At the end of the hearing, if the court finds against the appellant in the second appeal, that will mark the end of the matter and the first appeal, will, in that event, fall to be dismissed.

Second Appeal

[28] As already stated, this is the appellant's appeal against the High Court order dismissing his application for condonation of non-compliance with s. 103E of the Legal Profession Act 1976 (Act 166) which provides:

> 103E. Appeal from the decision of the Disciplinary Board
>
> (1) Any party aggrieved by any decision or order made by a Disciplinary Board shall have the right to appeal to the High Court **within one month of notification of the decision or order complained against.**
> (emphasis added)

[29] It is a common ground that the appellant only filed an appeal against the order of the DB dated 9 September 2011 on 11 December 2013; two years and three months from the date that he received the said order. Therefore, the appellant had clearly failed to comply with the timelines for appeal as provided under s. 103E of Act 166.

[30] During the course of argument, it was conceded by learned counsel for the appellant that there had been inordinate delay in the matter. However, learned counsel submitted that the justice of case required that the notices of motion should be granted.

[31] Learned counsel posited that the appellant's appeal has a good prospects of success. The appellant should not be denied or deprived of his opportunity to have his appeal be determined on its merits because of procedural default. It has often been said that, in pursuit of justice, procedure is a servant and not a master.

[32] Learned counsel for the respondent and intervener stoutly resisted the motion. They argued that:

(i) the delay in filing the motion was inordinate and inexcusable,

(ii) the appellant had failed to furnish any cogent and/or reasonable explanation for the inordinate delay of two years and three months in filing a notice of appeal. Similarly, no reason or explanation was furnished for his subsequent inordinate delay in filing for an extension of time;

(iii) the appellant as a lawyer, could not claim ignorance of the requirement to file an appeal within the time limit prescribed under the said section; and

(iv) where there is no reasonable and satisfactory explanation for the delay, the prospects of success are immaterial.

Our Analysis And Findings

[33] At the outset, it should be emphasised that when the appellant allows the time to file a notice of appeal to go by, his position suffers a radical change. Whereas previously he was in a position to appeal as of right; he now becomes an applicant for a grant of indulgence by the court.

[34] The power to extend the time to file a notice of appeal is discretionary, and has to be exercised judicially, having regard to established principles. In *Soh Keng Hian v. American International Assurance Co Ltd* [1996] 2 CLJ 449 (CA), Gopal Sri Ram JCA (as he then was), in delivering the judgment of the court, said at p. 453:

> It is axiomatic that this court is seized of a wide discretion to extend time in proper and deserving cases. But it is not unprincipled discretion. There must be some relevant evidential material available to us before we may exercise discretion.

[35] The principles governing the grant of leave to file a notice of appeal out of time may be summarised as follows:

(i) rules of court providing a time limit for the conduct of litigation, must, *prima facie*, be obeyed (See *Ratnam v. Cmaraswamy* [1964] 3 All ER 935; *Revici v. Prentice Hall Incorporated and Others* [1969] All ER 772).

(ii) where there has been a non-compliance with a time-limit, the court has a discretion to extend time (See *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram* [1998] 4 CLJ 883; [1998] 4 MLJ 297);

(iii) in exercising its discretion, the court will consider:

(a) the length of the delay;

(b) the reasons for the delay;

(c) the chances of the appeal succeeding if time for appealing is extended; and

(d) the degree of prejudice to the respondent if the application is granted;

(See *Development & Commercial Bank Bhd v. Tan Ong Hwa & Anor* [1992] 2 MLJ 764; *Bank Utama (Malaysia) Berhad v. Sistem Bis Komputer Sdn Bhd & Ors* [1994] 4 CLJ 347; [1994] 3 MLJ 452; *Abdul Rahim Ponniah Abdullah v. Kulim Intensive Driving Centre Sdn Bhd* [2000] 1 LNS 204; [2000] 6 MLJ 583).

[36] The above factors may not necessarily be exhaustive, but they are certainly convenient yardsticks to assess the merits of an application for extension of time to file a notice appeal. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any injustice that might result from the strict application of the rules of court.

Reasons For The Delay

[37] We have carefully scrutinised the affidavit in support of notices of motion and we find the appellant failed to furnish any relevant evidence to explain for the delay in filing a notice of appeal within the time limit prescribed under s. 103E of Act 166. The facts deposed in the affidavit in support have no bearing at all on the issue of delay. There was no attempt by the appellant to give any explanation why the rule was not adhered to.

[38] In this respect, we agree with the view of the learned trial judge that the facts deposed in the affidavit in support of the notices of motion are not materially relevant to explain the reason for the delay in filing a notice of appeal. At para. 18 of the judgment, the learned trial judge observed:

> [18] Dalam kes ini, saya berpendapat perayu yang merupakan seorang bekas Peguam, mengusulkan cerita-cerita atau kisah-kisah sedih peribadinya yang langsung tidak berkaitan dengan permohonan perlanjutan atau rayuan di sini. Perayu sebagai bekas Peguam sememangnya patut tahu mengenai kepentingan membuat rayuan dalam tempoh masa yang dibenarkan tetapi membiarkan rayuan tersebut tanpa difailkan selama 2 tahun 3 bulan tanpa apa-apa alasan yang munasabah ...

[39] We must emphasise that an application for condonation of non-observance of the rules of the court is by no means a mere formality. A full and detailed account of the causes of the delay and effect thereof must be furnished by an applicant. Therefore, a party seeking condonation, must, firstly offer an explanation for the delay in order for the court to understand fully how that non-compliance occurred; and secondly, show that the explanation so offered is *bona fide* and not unfounded. However, more importantly, when the failure to comply with the rules of the court has been flagrant and gross, condonation will not be granted, regardless of the prospects of success on the merit of the case of the party seeking condonation.

[40] The following passage from *Ratnam v. Comaraswamy and Others* (*supra*), is very much relevant to the present application:

> The rules of court must, *prima facie*, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to be providing a time table for the conduct of litigation.

[41] In *Revici v. Prentice Hall Incorporated and Other* (*supra*), Lord Edmund Davies LJ said:

> the Rules of the Supreme Court are there to be observed; and if there is non-compliance (other than of a minimal kind), that is something which has to be explained away. *Prima facie*, if no excuse is offered, no indulgence should be granted ...

[42] In that case Lord Denning MR dealt with the issue of delay and non-compliance with rules as follows:

> Nowadays we regard time very differently from what they did in the nineteenth century. We insist on the rules as to time being observed. We have had occasion recently to dismiss many cases for want of prosecution when people have not kept to the rules as to time. So here, although the time is not so very long, it is quite long enough. There was ample time for considering whether there should be an appeal or not (I should imagine it was considered). Moreover (and this is important), not a single ground or excuse is put forward to explain the delay and why he did not appeal. The Plaintiff had 31/2 months in which to lodge his notice of appeal to the judge and he did not do so. I am quite content with the way in which the judge has exercised his discretion. I would dismiss the appeal and refuse to extend the time any more.

[43] Having considered the underlying principles on granting an extension for leave to appeal out of time, we conclude that rules are there to be obeyed and only in exceptional circumstances the court can use its discretionary powers to exempt a party from complying with rules. Hence, the party so applying for an exemption is under a duty to offer cogent and/or reasonable explanation without which the court shall not use its discretion.

[44] In these instant appeals, there is no material on which the court can exercise its discretion to extend the time for the appellant to file a notice of appeal. The appellant has failed to demonstrate that he ought to be granted an extension of time to file a notice of appeal. We therefore, dismiss the second appeal, with costs.

The Chances Of The Appeal Succeeding If The Time Is Extended

[45] The appellant has raised several grounds as being meritorious and substantive for the court to consider should leave be granted.

[46] Elaborating on this, learned counsel sought to demonstrate that the DC has failed to consider the following material facts:

(i) the respondent is not the director of the company;

(ii) the respondent is not a creditor of the company;

(iii) the company does not own the sum of RM250,000 to the respondent;

(iv) the sum of RM250,000 is paid by the company and to hold in the account of the company for any purpose upon further instruction from the company;

A (v) it is agreed by the respondent to pay the money towards fees on 11 March 2010 as it is evident in the letters dated 11 June 2011 and 28 June 2011;

(vi) the company is wound up on 3 January 2011;

B (vii) the respondent's counsel has a duty to protect the appellant's legal fees;

(viii) the respondent's counsel acted in conflict of interest; and

(ix) it is a serious fraud and fraudulent concealment by the respondent and his counsel in suppressing evidence before the DB.

C **[47]** With respect, we disagree with the submission. A reading of the DC's report reveals that the DC had considered and evaluated all the relevant evidence adduced during the hearing. The factual findings and legal conclusions of the DC were amply supported by the credible evidence. The appellant has not been able to point to any error of principle, nor to any D matter which the DC wrongly took into account, or wrongly failed to take into account, nor has it been able to show that the DC's decision was plainly wrong. There is, therefore, no basis for interfering with the DC's finding which was accepted by the DB.

[48] The DC found that:

E (i) the sum of RM250,000 was paid to the appellant's firm with a covering letter stating that the said sum was released to the appellant's firm as stakeholders;

(ii) the appellant never sent a bill or invoice for legal services for the sum F of RM250,000 or any part thereof;

(iii) the appellant never issued any receipt for the sum of RM250,000 or for the other payments to the respondent for fees or advance payments; and

(iv) the appellant did not give any satisfactory explanation as to why he was refusing to return of the said sum.

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[49] We are satisfied that the appellant was given ample opportunity to be present at the hearing and have the benefit of cross-examining the complainant and his witnesses but he refused to do so. Therefore, the appellant cannot be heard to say that he was denied a fair hearing by the DC since he chose to stay away from the proceedings.

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[50] For the foregoing reasons, we hold that the second appeal would have only a fanciful chance of success because there are no grounds upon which the DB order could be quashed.

[51] Assuming for the sake of argument that there are reasonable prospects I of success on the merits, that would not necessarily be decisive because in these instant appeals there has been a flagrant breach of the rules of the court and there is no acceptable explanation for it. Therefore, the motion should not be granted whatever the prospects of success may be.

[52] Before we conclude, a pertinent question to be asked is this: where an appellant fails to satisfy the court as to the reasons for the delay, is the court obliged to go further? Our view is that the court ought to go only thus far and no further for two reasons:

(a) for otherwise it would place an applicant who has been lax in regard to time limits and who has failed to have the delay excused on par with an appellant who has complied with such time limit; and

(b) should the court go further looking for other criteria to grant extension of time, that would be contrary to the intention of the legislation which has thought it fit to set down time limits.

[53] In *R v. Secretary of State for the Home Department* [2014] EWCA Civ 1633, the court had this to say:

> (d) The merits
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> 46. If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them. Here too a robust exercise of the jurisdiction in relation to costs is appropriate in order to discourage those who would otherwise seek to impress the court with the strength of their cases.
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> 47. Support for that conclusion can be found in the recent decision of the Supreme Court in *HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v. Apex Global Management Ltd* [2014] UKSC 64, in which the court had to consider the extent to which the merits of a claim or defence were relevant to granting relief from the sanction of striking out in default of compliance with an "unless" order. Lord Neuberger, with whom Lord Sumption, Lord Hughes and Lord Hodge agreed, held that, even in a case of striking out, the merits of the claim or defence were relevant only when they were so strong that there was no real answer to them, in other words, in cases where an application for summary judgment could be expected to succeed. In Lord Neuberger's view (paragraph 30):
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> > ... it would be thoroughly undesirable if, every time the court was considering the imposition or enforcement of a sanction, it could be faced with the exercise of assessing the strength of the parties' respective cases: it would lead to such applications costing much more and taking up much more court time than they already do. It would thus be inherently undesirable and contrary to the aim of the Woolf and Jackson reforms.

A 48. In my view exactly the same considerations apply to applications for extensions of time for permission to appeal.

[54] In our view, it is not the function of the court to assess the actual merits but only to see whether *prima facie* it is obvious that the appeal is unmeritorious or wholly unlikely to succeed. The important point being as
B to whether there is a serious question for adjudication as opposed to it being frivolous or vexatious.

[55] We leave to the Federal Court to deal with that matter in the future.

[56] The only question that remains to be considered is the punishment
C meted out to the appellant. We are of the opinion that the striking-off the Roll of Advocate and Solicitors of the High Court Malaya meted out to the appellant by the DB is appropriate punishment in the circumstances of this case. (See *Bar Malaysia v. Mohd Fadli Shuib And Another,* Civil Appeal No. K-02-2354-10-2012 (CA)).

D **Conclusion**

[57] It is to be emphasised that the procedural requirements of the rules on appeal is not trivial technicalities that can be ignored. Indeed, non-compliance with the rules cannot be tolerated. The rationale for this strict approach is not difficult to appreciate. These rules are designed to facilitate
E the orderly disposition of appealed cases. As has been said time and time again, litigants ignore the rules and court orders at their peril.

[58] We adopt the view that whatever sympathy the court might have shown for the appellant must yield to the more important principle that a flagrant disregard for the court rules should not be countenanced.
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[59] All in all, we would dismiss the second appeal. Since there would be no competent appeal before us, the first appeal should also be dismissed. We award cost to the respondent in the sum of RM10,000 in respect of both appeals. The deposits to be refunded.

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